SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 75-918

* * *

WALTER C. ATCHLEY,
Petitioner,

v.

JOE R. GREENHILL, CHIEF JUSTICE, AND ZOLLIE STEAKLEY, JACK POPE, THOMAS M. REAVLEY, SEARS McGEE, JAMES G. DENTON AND SAM D. JOHNSON, ASSOCIATE JUSTICES, OF THE SUPREME COURT OF TEXAS AND JOHN H. MILLER, JUDGE OF THE DISTRICT COURT OF SAN PATRICIO COUNTY, TEXAS, 36TH JUDICIAL DISTRICT OF TEXAS

RESPONDENTS' BRIEF IN OPPOSITION

* * *

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JOE R. GREENHILL, CHIEF JUSTICE, AND ZOLLIE STEAKLEY, JACK POPE, THOMAS M. REAVLEY, SEARS McGEE, JAMES G. DENTON AND SAM D. JOHNSON, ASSOCIATE JUSTICES, OF THE SUPREME COURT OF TEXAS AND JOHN H. MILLER, JUDGE OF THE DISTRICT COURT OF SAN PATRICIO COUNTY, TEXAS, 36TH JUDICIAL DISTRICT OF TEXAS

* * *

RESPONDENTS' BRIEF IN OPPOSITION

* * *

OPINION BELOW

Petitioner seeks to review the opinion of the United States Court of Appeals for the Fifth Circuit reported at 517 F.2d 692. That opinion affirmed per curiam, the memorandum opinion of the United States District Court for the Southern District of Texas. The district court opinion is unreported, but a copy appears as Appendix B to the Petition for Writ of Certiorari.

JURISDICTION

The formal, procedural requisites would appear to be satisfied in this case although Respondents dispute

Petitioner's assertion that rights guaranteed by the United States Constitution have been denied him.

QUESTIONS PRESENTED

Petitioner describes five questions allegedly presented by the Application for Writ of Certiorari. Respondents feel that the question (or questions) presented can be more accurately and appropriately described as

Whether or not Petitioner can maintain a civil rights suit against the Texas District Judge who entered a summary judgment against him as Plaintiff in a vacancy case, and against Justices of the Supreme Court of Texas who refused to grant a writ of error in that case:

(1) Where Petitioner's suit in the federal district court was in the nature of an appeal seeking to review the judgment of the Supreme Court of Texas;

(2) Where the claim for relief is in essence a suit against the State of Texas and would require the granting of retroactive relief by the federal courts;

(3) Where the Texas judge and justices, in deciding adversely to Petitioner, were acting in their judicial capacity, thus giving rise to the doctrine of judicial immunity;

(4) Where Petitioner does not attack the judgment of the Court of Texas Civil Appeals at Beaumont which affirmed the District Court's decision against Petitioner and which Court of Civil Appeals decision was found to have no reversible error by the Texas Supreme Court justices who are defendants here;

(5) Where the affirmative injunctive relief requested by Petitioner against the Texas District Court and the Supreme Court of Texas lies without the power of the federal courts to grant; and

(6) Where the federal issues presented by Petitioner to the federal court below were or could have been raised in the state courts of Texas so that the

doctrines of res adjudicata and collateral estoppel are applicable.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner claims that the due process clause of the Fourteenth Amendment to the United States 42 U.S.C. § 1983, and Section 11 of Article V of the Texas Constitution are involved.

Respondents say that the Eleventh Amendment to the United States Constitution is pertinent to a decision in this case.

STATEMENT OF THE CASE

Petitioner filed suit in the state district court of San Patricio County, Texas, alleging that certain lands in the county had never been granted by the State of Texas and constituted a vacancy. The suit was brought under Article 5421(c), § 6 of Vernon's Texas Civil Statutes. This statute provides that the vacancy claimant, if successful, will be entitled to an interest in the minerals lying under the vacancy as a reward for finding the vacant land.

The occupiers of the surface were named as defendants along with numerous oil companies which had produced oil and gas from the tract for many years prior to the institution of the lawsuit.

The state district judge, Respondent John H. Miller, after an extensive record was developed, granted the vacancy defendants' Motion for Summary Judgment. Petitioner appealed this decision to the Texas Court of Civil Appeals and the trial court's judgment was affirmed on May 25, 1972, the decision reported as *Atchley v. Superior Oil Company*, 482 S.W. 2d 883 (Tex.Civ.App., Beaumont 1972).

Atchley then petitioned the Supreme Court of Texas

for writ of error, a procedure analogous to the petition for writ of certiorari used in the Supreme Court of the United States. The writ of error was refused by the Supreme Court on March 7, 1973, without written opinion with a notation "n.r.e.", meaning "no reversible error." Two of the nine justices of the Texas Supreme Court had recused themselves from acting on the petition for writ of error, one because of an interest in one of the defendant oil companies and one because of prior representation of Petitioner in the district court of San Patricio County. The seven justices who refused the writ of error are defendants below.

After the initial adverse determination by the Supreme Court, Atchley filed a Motion for Rehearing, wherein for the first time he raised, in the state courts of Texas, the issues presented to the federal district court below, (except for the question of defendant Judge Miller's ownership of an interest lying within the vacancy which was first considered at a hearing before the trial court where all parties to the suit, including Atchley, indicated that they were satisfied that Judge Miller was not disqualified).

In the Motion for Rehearing in the Texas Supreme Court and in the Complaint in the federal district court below, Atchley alleged that, while the vacancy case was pending in the Texas district courts, the district judge and members of the Texas Supeme Court met at a deer hunt and party and discussed the pending vacancy case. In this discussion, Atchley asserted that the members of the Supreme Court gave their opinion as to the merits of the vacancy lawsuit. Defendant Judge Miller, according to Atchley, then returned to his district bench and, in accordance with the opinion expressed by the members of the Texas Supreme Court, rendered Summary Judgment in favor of vacancy defendants and against Atchley. It was also alleged by Atchley that the trial

judge's son, an attorney, represented certain of the state court defendants in a vacancy case and that payments were made to him which were not for professional services. It was further asserted that the trial judge and certain of the Supreme Court justices owned stock in one or more of the corporate vacancy case defendants.

The defendant judge and justices filed a Motion to Dismiss which was granted by the federal district court below.[1] The Court of Appeals for the Fifth Circuit affirmed and rehearing was denied. This Petition for Writ of Certiorari followed.

ARGUMENT AND AUTHORITIES

I. The Federal District Court Below Lacked Subject Matter Jurisdiction To Hear And Decide Atchley's Claims Of Due Process Denial.

The court below rested its dismissal of Atchley's Complaint, in part, on its lack of jurisdiction over the subject matter. Rule 12(1), F.R.Civ.P. This decision as to jurisdiction was correct and should be affirmed by this Court for three reasons.

1. The Case Below Was In The Nature Of An Appeal Which Lies Without The Jurisdiction Of A Federal District Court.

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[1]Petitioner correctly suggests at page 11 of the Petition in the section, "Reasons Why Writ Should be Granted," that the district court, in dismissing the Complaint, and the court of appeals, in affirming the dismissal, were obligated to accept the allegations made as true. Petitioner says, "The Complaint is not only legally true, *but it is also true in fact.*" (Emphasis supplied) The first clause of the quoted statement is properly made, but the emphasized, second clause is improper and borders on the unethical. Respondents, accordingly, in response would say *the Complaint is untrue, in fact, and that there was no "deer hunt advisory opinion" and that they owned no stock in any of the corporate defendants in the vacancy case.*

Petitioner essentially seeks to reverse the judgment of the Supreme Court of Texas, relief in the nature of an appellate review.

A federal district court lacks appellate jurisdiction to make the determination called for by Petitioner Atchley, that function being accorded to the Supreme Court of the United States under the judicial framework of our federal system. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923);*Essanay Film Manufacturing Co. v. Kane*, 258 U.S. 358 (1922);*Hill v. McClellan*, 490 F.2d 859 (5th Cir. 1974); *Brown v. Chastain*, 416 F.2d 1012 (5th Cir. 1969), cert. den. 397 U.S. 951 (1970); *Paul v. Dade County, Florida*, 419 F.2d 10 (5th Cir. 1969).

While the cases in the circuit below are not totally consistent in holding that a federal district court lacks the necessary appellate jurisdiction to review a decision by the highest court of a state (compare *Mack v. Florida State Board of Dentistry*, 430 F.2d 862 (5th Cir. 1970) with the cases above cited), the latest expression on the subject by Fifth Circuit is found in *Hill v. McClellan*, supra, wherein it was succinctly stated that

> "A federal district court has no original jurisdiction to reverse or modify the judgment of a state court." 490 F.2d 862.

Petitioner seeks to draw a distinction between the instant case and the decisions in *Rooker v. Fidelity Trust Co.*, supra; *Paul v. Dade County, Florida*, supra; and *Brown v. Chastain*, supra, since in those decisions the federal claims were raised and considered in the state courts, while, in the present case, Petitioner maintains that his federal claims were not raised and considered in the state courts. This distinction is without substance.

It should first be noticed that the district judge, Judge Miller, a Defendant below and Respondent herein, raised the question of his possible

disqualification early in the vacancy case (reference is made to the Transcript of this proceeding attached as Exhibit B to Defendants' Memorandum Brief in Support of Defendants' Motion to Dismiss filed in the case below and a part of the on appeal in the Fifth case below and a part of the record on appeal in the Fifth Circuit). Judge Miller disclosed an interest in a tract of concluded by Atchley that this land was not within the claimed vacancy.

Judge Miller also revealed that he had an interest in Coastal States Gas Producing Company, a company which, with possible affiliates and subsidiaries, apparently gathered and transported natural gas from some of the properties within the alleged vacancy. It was noted that Coastal States had filed an answer in the suit disclaiming any interest in the vacancy. Petitioner, through Mr. Holloway, his attorney then and now, observed:

> "The Plaintiff named Coastal States, I believe in their Original Petition, and we subsequently ascertained, as far as we are concerned, that Coastal States claims no interest in the land, and we, as Plaintiffs, have urged no claim against Coastal States."

Later Mr. Holloway stated:

> "So far as the plaintiff is concerned the ownership of stock presents no disqualification, Your Honor."

Atchley then took a non-suit against Coastal States to avoid any possible question of Judge Miller's disqualification.

Regarding the alleged stock ownership by the Defendant Supreme Court Justices, observation is made that one justice recused himself because of stock ownership in a defendant vacancy-case corporation and

another because of earlier representation of the Petitioner Atchley in the vacancy case. However, Petitioner filed no motion to disqualify other justices before judgment because of possible stock ownership and no allegation of pecuniary interest by the justices appeared in either of his motions for rehearing before that Court, his first motion which was struck from the record or his second which was subsequently filed.

Even in his Complaint in the district court below, Atchley said only that:

> "Plaintiff has been informed . . . and *chooses to believe*. . . that the defendant District Judge John H. Miller and one or more of the other Defendants herein (the Justices) . . . owned stock or other securities in one or more of the corporate defendants in the vacancy case." (Emphasis added).

Nowhere did Petitioner allege that this "information" "which he chooses to believe" was unknown to him at the time the vacancy case was presented to the Texas Supreme Court or that it could not have been discovered by the exercise of due diligency. Without such or similar allegations, the Complaint (besides being deficient in stating a cause of action with regard to the asserted stock ownership of the Defendant Justices) is deficient in supporting Petitioner's proposition that he should have a federal forum since the federal issues were not presented to or decided by the state courts.

Moreover, constitutional rights, like all other rights, can be waived if not properly raised, as will be shown below. While Petitioner has argued the absurdity of presenting the disqualification of the justices to the state district court, it would have been neither absurd nor futile to have presented the question of justice disqualification to the Texas Supreme Court.

of justice disqualification to the Texas Supreme Court.

Petitioner's lack of enthusiasm in the state courts for his now asserted constitutional rights is further demonstrated by his failure to raise the alleged "deer hunt advisory opinion" given by the Defendant Justices to the Defendant Judge, at the district court level where the point might have been urged by a motion for disqualification and certainly by motion for new trial. (Articles 15 and 200a, Vernon's Texas Civil Statutes and Rules 320 et seq., Texas Rules of Civil Procedure). And this alleged activity on the part of the judge and justices was certainly known to Petitioner before the judgment of the district court as shown by Paragraph 5, Page 5 of the Complaint and Page 28 of his Brief in the Court of Appeals.

In sum, the case below involved the alleged denial of civil rights which Petitioner *failed*, neglected or refused to bring to the attention of the Courts of the State of Texas at a time when such urged issues could have been easily resolved.

Certainly, all of the alleged disqualifying factors could have been presented to the Supreme Court of Texas by his second Motion for Rehearing, even though Atchley's first Motion for Petition of Rehearing was ordered struck from the record as being unprofessional and contemptuous. Such allegations and the decision thereon could then have been presented to this Court. Moreover, the very act of the Supreme Court of Texas in striking the first Motion for Rehearing, could have been reviewed by this Court, and if the decision to strike the petition was unwarranted, proper, remedial relief could have been ordered.

Accordingly, it is evident that *Paul v. Dade County, Florida* and *Brown v. Chastain* must stand for the proposition that a federal district court will not review the judgment of a state court where the federal issues

were litigated in the state courts or where the federal issues *should* have been litigated. *Cambist Films Inc. v. Duggan*, 475 F.2d 887 (3rd Cir. 1973) *Kriesel v. Berkshire Associates, Inc.*, 452 F.2d 491 (4th Cir. 1971); *Nickerson v. Kutschera*, 390 F.2d 812 (3rd Cir. 1968); *Acree v. Air Line Pilots Association*, 390 F.2d 199 (5th Cir. 1968).

It is also clear that constitutional rights can be foreclosed and waived by the failure to urge such rights at the proper time, unless an excuse for such failure can be affirmatively shown, i.e., an excusable lack of knowledge of such right or a showing of the ineffectiveness of counsel at the purported waiver. *Henry v. Mississippi*, 379 U.S. 443 (1965); *Davis v. United States*, 411 U.S. 233 (1973); *Tollett v. Henderson*, 411 U.S. 258 (1973); and *Winters v. Cook*, 489 F.2d 174 (5th Cir. en banc, 1973).

It is equally clear that parties to a federal action cannot confer jurisdiction on a federal court where none exists by procedural manipulations. *Carribean Mills, Inc. v. Kramer*, 392 F.2d 387 (5th Cir. 1968), affirmed 394 U.S. 823 (1969).

Petitioner's failure to raise his federal claims in the state courts of Texas and his failure to assert these claims in the Supreme Court of the United States, should not, and does not create a forum in a federal district court which would not have been available to him had he raised the federal questions in the state courts at the proper time.

2. There Is No Federal District Court Jurisdiction Where Judges Of A State Court Are Sued In A Civil Rights Action For Acts Done Within The Scope Of Their Judicial Duties.

Forming a part of the lack of subject matter jurisdiction here, is the doctrine of judicial immunity as

interpreted by the Court of Appeals below. (As later noted, judicial immunity also provides a basis for dismissing the petition below for failure to state a cause on action upon which relief can be granted).

Relying on *Pierson v. Ray*, 386 U.S. 547 (1967), the Court in *Cheramie v. Tucker*, 493 F.2d 586 (5th Cir. 1974),observed that "Section 1983 (under which Petitioner is seeking relief) does not affect the well established rule that judges are immune from damage suits arising out of the exercise of their judicial function." The Court in *Cheramie* next noted that the plaintiff-appellant was not seeking damages, but rather was asking the federal courts to hold the state court decision to be unconstitutional. The Court then stated:

> "Furthermore, it is far from clear that the relief appellant requests is equitable. He requests us to hold the state appellate decision unconstitutional, a measure which would presumably reinstate the judgment rendered in the trial court. In essence the appellant seeks reinstatement of a damage award against the State of Louisiana's Highway Department. This is a result not directly obtainable under § 1983." 493 F.2d 588.

Seemingly, the Court is holding that there is no cause of action against state judges who have acted in a judicial capacity, under Section 1983, Title 42, U.S.C. Ergo, no subject matter jurisdiction.

Again, the Court of Appeals for the Fifth Circuit, in *Hill v. McClellan*, supra, at page 860, wherein plaintiff-appellant was seeking in part an order from the federal courts voiding a state judgment, said:

> "There is no cause of action under the Civil Rights Act if a case is private litigation in which the state does no more than furnish the forum

> and has no interest in the outcome . . . Merely characterizing defendants' (the Courts') conduct as conspiratorial or unlawful does not set out allegations upon which relief can be granted under the Civil Rights Act."

* * * * *

Accordingly, the district court below was correct in determining that it lacked subject matter jurisdiction in this cause for the reasons that Atchley's cause of action is an attempt to obtain appellate review in a federal district court of a state court judgment and because Section 1983, the Civil Rights Act, does not create a cause of action where the named defendants are judges of the state judiciary and the acts complained of arose from the exercise of their judicial functions. And the Court of Appeals was correct in affirming this determination.

II. The District Court Below Properly Dismissed Atchley's Lawsuit For Failing To State A Claim Upon Which Relief Can Be Granted And The Court Decision.

The federal district court below based its decision to dismiss the Complaint, as noticed above, on the lack of subject matter jurisdiction. In addition, the district court justified its dismissal on the failure of the Complaint to state a claim upon which relief can be granted. F.R.Civ.P. 12(b)(6). The court of appeals affirmed. Respondents say the Complaint failed to state a cause of action in four particulars.

1. Atchley's Petition Failed To State A Cause Of Action Because The Requested Relief Can Never Be Granted Without Joining The Judges Of The Intermediate Appellate Court Which Reviewed And Affirmed The Judgment

Of The Trial Court Which Had Decided The Vacancy Case Adversely To Atchley.

Defendant John H. Miller, the Texas district judge presiding over the district court of San Patricio County, Texas, entered a summary judgment rejecting the contentions of Atchley in the vacancy case.

On appeal, the judgment was affirmed by the Court of Civil Appeals for the Ninth District of Texas, sitting at Beaumont. *Atchley v. Superior Oil Company*, supra.

Petitioner then sought review by the Supreme Court of Texas by petition for writ of error which was refused by the Texas Supreme Court on March 7, 1973.

Petitioner seeks to require the state district court and the Supreme Court of Texas to expunge from their records the respective judgments of the two courts and further asks that the vacancy case be reinstated on the docket of the district court. Even if such relief was proper and were granted, the unattacked decision of the Beaumont Court of Civil Appeals in favor of the vacancy case defendants and adverse to Atchley would stand forever as a bar to any further proceeding by Atchley to establish his vacancy claim.

The Supreme Court of the United States in *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937), observed at page 241 of the opinion:

> "Where there is . . . a concrete case admitting of an immediate and definitive determination of the legal rights of the parties . . . , the judicial function may be appropriately exercised . . . "

Here, the legal rights asserted by Petitioner cannot be resolved by a "determination of the legal rights of the parties" absent an attack on the Beaumont Court of Civil Appeals judgment. The relief which Petitioner is

seeking, the recommencement of the vacancy case, can never be obtained in the present cause. Accordingly, no claim is stated upon which the relief desired can be granted and the "judicial function" of the federal courts should not be "exercised".

2. The Relief Requested By Atchley Would Have Required The Federal Court To Order Affirmative Action By The Texas Courts And So Dismissal Was Proper.

As demonstrated above, even if Petitioner obtained the relief requested in his Complaint, the result which he is seeking, the continuation of his vacancy case, would not have been achieved -- the still existing and still valid decision of the Beaumont Court of Civil Appeals stands squarely for the proposition that Atchley has no right to further adjudicate his vacancy case.

Appellees would further urge that the relief requested, while being pointless and fruitless, is not within the power of the federal district court to grant. It is reiterated that Petitioner seeks to *require* the state district court and the Supreme Court of Texas to expunge from their records the respective judgments of the two courts and further asks that the Texas courts be required to reinstate the vacancy case on the docket of the district court.

While the federal courts may, under proper circumstances, have the power to stay or enjoin a state court from enforcing a judgment that offends constitutional principles and the power to enjoin judgment holders from deriving benefits from such judgment, they may not properly require affirmative action of any state court. *Marshall v. Holmes*, 141 U.S. 589 (1891); *Dixon v. Beto*, 472 F.2d 598 (5th Cir. 1973).

Accordingly, the Complaint, in asking the Court to compel positive, affirmative action by the Texas courts,

is requesting an impossible act and fails thereby to state a claim upon which the relief prayed for may be granted.

3. The Doctrines Of Res Adjudicata And Collateral Estoppel Bar Recovery By Atchley.

The Complaint below clearly shows that the issues which Petitioner asserts in the instant case were raised in the state courts of Texas and decided adversely to Atchley *or* that such issues could have been and should have been raised.

The question of Judge Miller's disqualification was raised in the state district court and a decision was made that he was not disqualified, a decision concurred in by Petitioner. No question of Judge Miller's disqualification was raised on appeal in the Texas appellate courts, and this default is sufficient to bar any relief on this issue in the federal courts. *Barbour v. Georgia*, 249 U.S. 454 (1919); *Houston Oil Co. v. Kimball*, 122 S.W. 533 (Tex.Sup. 1909).

The "deer hunt advisory opinion" issue was presented to the Supreme Court of Texas by Plaintiff's first Motion for Rehearing, and note is made that a constitutional, due process claim can be made by Motion for Rehearing. *Sanders v. Shaw*, 244 U.S. 317 (1917). While this pleading was stricken from the records as being unprofessional and contemptuous in both content and spirit, the Court's decision to strike perforce means consideration of the motion. And if there had been merit to the content of the Motion, it would have been improper to order the striking of the Motion. This impropriety could have been presented to the United States Supreme Court for its consideration. Parenthetically, Plaintiff could have reinforced his chances of the United States Supreme Court review by filing a Motion to Disqualify the "deer hunt" justices

prior to their decision, asserting their interest in the suit by virtue of their claimed deer hunt activities. If the allegations involving the deer hunt demonstrated a due process denial, then the judgment of the Supreme Court of Texas could have been set aside by the United States Supreme Court.

While the question of asserted pecuniary disqualification of the Texas justices was not raised in the state courts of Texas, it should have been raised or the non-negligent failure to raise the issue should have been explained in the Complaint. (Petitioner obviously knew of the participation of Judge Miller's son in the vacancy case since he attended the state court hearings). hearings).

Appellees urge that the principles of res adjudicata and collateral estoppel bar recovery by Petitioner in this cause. The application of these doctrines bars a re-determination of issues which have been presented to an earlier court *and issues which should have been presented. American Surety Co. v. Baldwin*, 287 U.S. 156 (1932); *Cambist Films, Inc.*, supra, *Nickerson v. Kutschera*, supra; *Acree v. Air Line Pilots Association*, supra.

The fact that the parties are not identical does not defeat estoppel or res adjudicata. There would be an identity of the parties if the vacancy case defendants (the judgment holders against Atchley) had been made parties to this suit. The failure to join these defendants will not defeat the application of res adjudicata and collateral estoppel. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Tang v. Appellate Division of the New York Supreme Court*, 487 F.2d 138 (2nd Cir. 1973); *Seguros Tepeyac, S.A. v. Jernigan*, 410 F.2d 718 (5th Cir. 1969); Restatement Second of Judgments, sec. 88 (Tentative Draft No. 2, 1975). In *Seguros*, the Court observed:

> "Appellant's second contention as to the need for an identity of parties in a collateral estoppel situation is also without merit. We note, to begin with, that an increasing number of courts have dispensed with the requirements of identity of the parties or mutality of estoppel in situations where the party against whom the estoppel is applied has already had his 'day in court.'" 410 F.2d at 727.

See also *Rachal v. Hill*, 435 F.2d 59, 61 (5th Cir. 1970); *St. Louis Typographical Union No. 8 v. Herald Company*, 402 F.2d 553 (8th Cir. 1968); *Application of Pritchard*, 463 F.2d 1359 (Ct. of Custom & Patent App., 1972); *Iacaponi v. New Amsterdam Casualty Company*, 379 F.2d 311 (3rd Cir. 1967), cert. den. 389 U.S. 1054 (1968).

Finally, where collateral estoppel and res adjudicata are evident from the Complaint, dismissal is proper. *Nickerson v. Kutschera*, supra; *Iacaponi v. New Amsterdam Casualty Company*, supra.

The Complaint was properly dismissed under the doctrine of res adjudicata and collateral estoppel, their application to Petitioner revealing the lack of a claim upon which relief can be granted.

4. The Complaint Below Was Properly Dismissed Since The Defendant Judge And Defendant Justices Are Immune From Civil Suits.

Petitioner's Complaint in the federal district court attacked the judicial acts of the defendant judge and justices.

In *Cheramie v. Tucker*, supra, the Court of Appeals for the Fifth Circuit observed, citing *Pierson v. Ray*, supra, that the doctrine of judicial immunity is

universally recognized in suits for damages against the judiciary, and further noted that, where only equitable or injunctive relief is sought, judicial immunity may not apply according to some decisions. But the Court then noted that equitable relief would also cause "real interference with the discretionary functions of the judge" and rejected the line of authority that does not recognize judicial immunity where damages are not sought.

Moreover, in *Hill v. McClellan*, supra, the Fifth Circuit held that judicial immunity was applicable and viable both where the relief sought is in the form of damages or where the setting aside of a state court order is requested. The Court stated, at page 860 of the opinion, that

> "Judges acting within their jurisdiction and authority are immune from suit under §§ 1983 and 1985."

The Court went on to say that the plaintiff-appellant

> "has not stated a claim for which relief may be granted under 42 U.S.C. §§ 1983 and 1985".

Under the authority of *Hill v. McClellan*, supra, and *Cheramie v. Tucker*, supra, the Respondents say that Petitioner has not stated a claim for which relief can be granted.

* * * * *

It must be concluded that the district court below was correct in dismissing this cause for failure to state a claim upon which relief can be granted because the relief requested will in no way open the vacancy case to retrial, because the relief requested against the Texas state courts lies without the power of a federal district court to grant, because the doctrines of res adjudicata and collateral estoppel bar any affirmative decision in

favor of Petitioner, and because the doctrine of judicial immunity precludes relief against any of these judicial defendants. The Court of Appeals was correct in affirming the dismissal.

CONCLUSION

For the reasons advanced above, the Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, attorney for Respondents, certify that two copies of the above and foregoing Respondents' Brief in Opposition have been served by placing same in the United States Mail, certified, postage prepaid, addressed to : Mr. Pat S. Holloway, Attorney at Law, 3400 Republic National Bank Tower, Dallas, Texas, 75201, on this the _____ day of January, 1976.

LONNY F. ZWIENER
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